

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 93B009

EEOC Charge No.

CCRD Charge No.

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

CATHRYN L. DIAZ,

Complainant,

vs.

DEPARTMENT OF NATURAL RESOURCES,

Respondent.

The hearing was held on June 20, 1994. Complainant was present at the hearing and represented by Barry D. Roseman, attorney at law. Respondent appeared at the hearing through Eric Decator, assistant attorney general.

Complainant Cathryn Diaz testified in her own behalf and called Ron Cattany, deputy director of the Department of Natural Resources ("DNR" or "department"), to testify at hearing. Respondent called Cindy Horiuchi, personnel administrator for DNR, and Ron Cattany to testify at hearing.

The parties stipulated to the admission of Complainant's exhibit A and Respondent's exhibit 2. Complainant's exhibit B was marked and withdrawn. Complainant's exhibit C was admitted into evidence without objection. Complainant's exhibits D and E were admitted into evidence over Respondent's objection.

PROCEDURAL MATTERS

Complainant filed an appeal of her lay off with the State Personnel Board ("SPB") on July 22, 1992. On August 13, 1992, Respondent moved to dismiss the appeal on the grounds that the lay off did not affected Complainant's pay, status or tenure. Respondent maintained that since Complainant was offered a comparable position, the senior administrative clerk, position number 169, her appeal could not be considered because she suffered no injury.

Respondent further argued that the motion to dismiss should be granted because Complainant failed to allege that the decision to lay her off was arbitrary, capricious or contrary to rule or law.

On September 1, 1992, an ALJ entered an order granting the motion to dismiss. No explanation was given for the Administrative Law Judge's ("ALJ") ruling. On October 1, 1992, Complainant appealed the dismissal order to the SPB. Complainant challenged the ALJ's determination that Respondent's action laying her off did not affect her pay, status or tenure because she was offered an allegedly comparable position.

On October 5, 1992, Respondent moved to dismiss this appeal to the SPB on the grounds that on appeal to SPB Complainant raised issues which were not raised before the ALJ. Respondent maintained that the Board could not consider issues on appeal which were not raised before the ALJ and therefore the appeal should be dismissed. On December 17, 1992, SPB entered an order granting Respondent's motion to dismiss. The Board order states that Respondent's motion is granted because Complainant attempted to raise on appeal to the Board issues not presented to the ALJ.

Complainant appealed the Board order dismissing her appeal to the Colorado Court of Appeals, naming only the DNR as Respondent-

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Appellee. Respondent moved to dismiss the appeal on the grounds that the SPB was an indispensable party to the appeal and failure to join them as a party provided grounds for the Court to dismiss the appeal. Complainant responded to the motion to dismiss and moved to join the SPB as a party. On March 1, 1993, the Court denied the motion to dismiss and granted Complainant's motion to join SPB as a party.

On March 3, 1994, the Court of Appeals reversed the Board's order dismissing the appeal and remanded the case with direction to hold a full evidentiary hearing. The Court found that Complainant was appealing the lay off process and the issues to be considered should be framed based on the totality of the pleadings filed. The Court further found that Complainant was not precluded from challenging the lay off on the basis of an issue raised by Respondent in its motion to dismiss Complainant's July 22, 1992, appeal. The Court concluded that since the ALJ dismissed the appeal without comment, it must be concluded that the dismissal order was based on the arguments presented by Respondent in its motion. The basis upon which the motion to dismiss was granted, the Court concluded, was properly raised by Complainant on appeal to SPB.

PRELIMINARY MATTERS

1. Complainant has the burden of proof and the burden of going forward in this matter. Renteria v. Colorado State Department of Personnel, 811 P.2d 797 (Colo. 1991).

2. At the evidentiary hearing held on June 20, 1994, Respondent moved to dismiss the appeal at the conclusion of Complainant's case in chief. Respondent maintained that Complainant failed to sustain her burden of proof to establish that the lay off was arbitrary, capricious or without rational basis. Furthermore,

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Respondent argued that Complainant did not possess the minimum qualifications for the position of staff assistant I or II and therefore could not be appointed to the position either through reallocation or by any other means. Finally, Respondent maintained that Complainant failed to establish that the person appointed to the staff assistant I position was pre-selected.

Complainant argued that the motion to dismiss should be denied because evidence was presented that established that the decision to lay her off was arbitrary, capricious and contrary to rule and law. Complainant maintained that she established that Board Rule R9-3-1 was violated because Respondent failed to prepare a plan of reorganization and the purported reorganization plan did not result in changes to the fundamental structure, positions and/or functions accountable to the appointing authority. In the alternative, Complainant argued that if it is determined that a reorganization plan was adopted, Complainant maintained that it was established that this was not the plan which was implemented.

It was Complainant's contention that Respondent had the duty to adopt a plan of reorganization which was consistent with the plan ultimately implemented.

Finally, Complainant maintained that she further established that the action taken by Respondent was not a layoff but was a reallocation pursuant to Director's Procedure P2-2-5. Complainant argued that she established that her position number 49, classified as a senior administrative clerk, was reallocated to the staff assistant I level. Complainant contends that she established that she is qualified for the staff assistant I position and should have been appointed to that position pursuant to the director's procedure.

Respondent's motion to dismiss was denied in part and granted in part. Respondent's motion to dismiss was granted with regard to

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the issue of pre-selection for the staff assistant position. Respondent's motion to dismiss was denied with regard to Complainant's challenge of the lay off. It was concluded that Complainant presented sufficient evidence to make a prima facie showing of arbitrary and capricious action with regard to the lay off.

3. Respondent requested that the ALJ take administrative notice of the Court of Appeals decision in Cathryn Diaz v. The Industrial Claims Appeals Office of the State of Colorado and the Colorado State Natural Resource Division Executive Director, No. 93CA1108 (Colo. App., February 1, 1994). Complainant objected to the request, citing section 8-74-108, C.R.S. (1986 Repl. Vol. 3B), as authority for her position that the court's decision is not conclusive, binding nor can it be used as evidence in this proceeding. Respondent withdrew its request that the ALJ take administrative notice of the decision.

4. Respondent requested that the ALJ rule as a preliminary matter, that should Complainant prevail, she is not entitled to an award of back pay. It was Respondent's contention that following Complainant's lay off she was offered a senior administrative clerk position pursuant to the provision of Board Rule R9-3-7. Respondent argued that since Complainant declined to accept the position, she failed to mitigate her damages and therefore was not entitled to an award of back pay.

Complainant argued that she was well within her rights to decline the position offered to her pursuant to R9-3-7 because the position was not comparable to the one from which she was laid off. Complainant argued that the ALJ should not rule as a preliminary matter that her damages were limited because of her alleged failure to mitigate damages.

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The ALJ declined to make a preliminary ruling that Complainant's damages were limited due to her alleged failure to mitigate damages.

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MATTER APPEALED

Complainant appeals her layoff from her position as a senior administrative clerk with DNR.

ISSUES

1. Whether the decision to lay off Complainant was arbitrary, capricious or contrary to rule or law.
2. If the decision to lay off Complainant was arbitrary, capricious or contrary to rule or law, whether Complainant is entitled to relief.
3. Whether Complainant is entitled to be reinstated to the senior administrative clerk position.
4. Whether either party is entitled to an award of attorney's fees under the provisions of section 24-50-125.5, C.R.S. (1988 Repl. Vol. 10B).

FINDINGS OF FACT

1. Complainant Cathryn Diaz was employed by DNR for four and one half years. Diaz worked in the executive director's office, in the communications office, under the supervision of Kathy Kanda. Diaz was classified as a senior administrative clerk in July 1992, the time relevant to this appeal.
2. Diaz' job responsibilities required that she assist Kanda in producing and disseminating a number of DNR publications. Diaz was in charge of all mailing list. She was required to keep in touch with legislator and constituents throughout the state. She did filing and ordered materials from the design center. Diaz'

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job duties required that she make sure that deadlines were met and she was required to make sure that production deadlines were met.

Diaz made contact with persons in DNR and other state departments to gather information which was used by Kanda in publications. Diaz completed purchase requisitions whenever anything had to be printed in the communications office. Diaz ordered supplies for the whole section. Diaz used wordperfect 5.1 computer program.

3. In July 1992, Diaz spent 20% of her time assisting in the preparation of publications under the Kanda's direction. The remainder of Diaz' time was spent working as a backup receptionist and assisting in another section of DNR.

4. Prior to July 1992 Ken Salazar, executive director of DNR, began consideration of a plan to reorganize the department. Salazar's announced purpose in reorganizing DNR was to create a long range budget and planning function and to increase support in the communications office of the department. To further these goals, Salazar announced a plan on July 7, 1992, that created the position of director of planning and budgeting. The plan further abolished Diaz' position of senior administrative clerk in the communications office. Diaz' position was abolished and redefined as a staff assistant II position.

5. Additional results of the reorganization plan upgraded Kanda's position as a senior public information specialist to a program administrator I classification. In the plan of reorganization, a DNR receptionist position was increased from 0.5 to 1.0 FTE and upgraded from administrative clerk to word processing operator.

6. The reorganization plan dated July 7, 1992, was posted in the department. Of the 66 employees in the department, Diaz' position was the only one abolished. The reorganization plan constituted a

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proposal of what the department hoped to accomplish if the legislature provided the necessary funding and FTE authorization, and the positions identified in the plan were sustained at the classifications assigned.

7. The reorganization proposed by Salazar created the staff assistant position which reported to Kanda, as Diaz had previously. The position provided clerical and technical support to Kanda, as Diaz had previously.

8. The staff assistant classification is categorized as an entry level position in the technical series. Diaz' classification as a senior administrative clerk is categorized as a position at the top of the clerical series. The duties described in the class specification for the staff assistant position are substantially similar to the duties Diaz performed in the senior administrative clerk position. The exception was that Diaz did not perform duties requiring desk top publishing nor did she perform public speaking on behalf of the department.

9. Cindy Horiuchi, the director of DNR human resource section, advised Salazar and Cattany during the planning and implementation phases of the reorganization. In approximately May 1992, Horiuchi reviewed the reorganization plan for the first time. A technical review of the positions involved in the reorganization was not conducted to determine if the positions were properly classified at the level or in the classification in which they appeared in the plan as posted in July 1992. Horiuchi's section was too busy between May and August 31, 1992, to conduct such a review.

10. Horiuchi was not aware of the degree of skill or the amount of time spent performing desk top publishing duties in the staff assistant classification. Horiuchi believed that the staff assistant classification required that an individual appointed to

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the position type at the rate of 50 wpm. Diaz took typing tests while employed in the department on numerous occasions and typed at a rate of 40 wpm. Horiuchi believed that Diaz was not qualified for the staff assistant position based on her typing speed and other skills.

11. Horiuchi maintains a departmental listing of displaced employees. Following a lay off, staff in the human resource section notify employees if a position opens for which they possess the qualifications. Since Diaz was not deemed to be qualified for the staff assistant position she was not notified when candidates were considered for permanent appointment to the staff assistant position in March 1993.

12. The class specification for the staff assistant position does not provide that one must type at the rate of 50 wpm. Nonetheless, this was an important basis upon which Horiuchi excluded Diaz from consideration for or notification of the position opening for staff assistant I in March 1993.

13. Diaz learned when she returned from vacation on July 13, 1992 that her position, position number 49 as a senior administrative clerk, was abolished, effective August 31, 1994. Diaz was offered a senior administrative clerk position in DNR's division of water resources, records section. The duties of the position were significantly less responsible than the duties performed in the communications office. The position required significantly less computer work and it required lifting and bending to pick up water records weighing 20 lbs.

14. Diaz suffered from a condition that prevented her from lifting any weight. In July 1992, Diaz believed that she suffered from a hernia. In October 1992, Diaz learned that she had a condition where a lump around her belly button swelled and

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decreased in size on a regular basis. The condition made lifting objects painful and caused pain when Diaz bent over.

15. Diaz declined the position offered because it was not comparable to the position from which she was laid off. She further declined the offer to accept the position because she did not believe she had the physical ability to perform the duties of the position. Diaz was laid off. Diaz' name was placed on a reemployment list for a period of one year in the job classification of senior administrative clerk.

16. Diaz was not notified of any position in the department for which she could apply. Diaz did not apply for the staff assistant position. She was advised by Kanda following the lay off that she did not qualify for the staff assistant position so she should not bother to try applying for the position. This advise from Kanda, coupled with Diaz' belief that she needed desk top publishing skills, public speaking experience and 50 wpm typing ability, caused her not to pursue the position.

17. In September 1992, the department implemented a part of their plan to reorganize the department. However, instead of creating a position at the staff assistant II level, a substitute "S" appointment pursuant to Director's Procedure, P5-2-10, was created. This position was classified as a staff assistant I position. It was so classified because human resources section staff determined that based on the duties of the position, this was the proper classification. The staff assistant I position had greater emphasis on clerical duties, while the staff assistant II position had greater emphasis on technical duties.

18. Carolyn Amato, a DNR employee, was transferred to the temporary position at the staff assistant I level in the communications office. Amato was advised that the creation of a

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permanent position was contingent on legislative funding and FTE authorization. Amato was informed that without such funding the position might not be created on a permanent basis.

19. Amato served in the staff assistant I position until March 1993 when funding was received to create the position of a staff assistant I on a permanent basis. Amato applied for the permanent staff assistant I position and was appointed. The position of the director of budget and planning was create and an appointment to the position was made in November 1992, when funding and authorization was received.

DISCUSSION

A certified state employee has a right to appeal a decision to lay her off. Section 24-50-125.5, C.R.S. (1988 Repl. Vol 10B). At hearing, the employee who has been laid off has the burden of proof and the burden of going forward to establish that the decision to lay her off was arbitrary, capricious or contrary to rule or law. Renteria v. Colorado State Personnel Board, *supra*.

A presumption of regularity attaches to the many administrative decisions made on a daily basis by state agency's. Chiappe v. State Personnel Board, 622 P.2d 527, 532 (Colo. 1981). However, arbitrary and capricious action is shown when it is established that the appointing authority has not given candid consideration to the evidence, neglected or refused to procure evidence or has exercised discretion based on the evidence in such a way that reasonable people must reach a contrary conclusion. Van de Vegt v. Board of Commissioners, 55 P.2d 703, 705 (Colo. 1936).

Complainant argues that Respondent's action in laying her off was arbitrary, capricious and contrary to rule and law. Complainant maintains that the lay off was not a bona fide reorganization because changes to the structure, positions and/or functions

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accountable to the appointing authorities did not occur. Complainant maintains that her position was the only one abolished in a department of 66 employees. She argues that her position was abolished and redefined to a position which performed substantially the same duties she performed as a senior administrative clerk.

Complainant contends that Respondent's explanation that the executive director intended to create for the first time long range budgeting and planning capability was just a smoke screen. Complainant argues that the plan to create the director of budget and planning position was distinct from the decision to redefine her position in the communications office and to classify it as a staff assistant. Complainant contends that the abolishment and redefinition of her position was not necessary and violated R9-3-1.

Complainant argues that Board Rule R9-3-1 requires that Respondent formulate a plan for the reorganization. Complainant contends that Respondent had no plan of reorganization, it had only the objective of improperly abolishing Complainant's position. From the point that Respondent abolished her position, Complainant contends that every other aspect of the reorganization was contingent upon events that were not within the control of the department. Complainant argues that the fact that the department did not have funding for the director position until November 1992, and staff assistant position in March 1993, supports her contention that the plan as posted July 7, 1992, was speculative at best.

In further support of Complainant's arguments, she points to the fact that there was no classification review conducted to determine whether the positions described in the reorganization plan were properly classified. Complainant further points to the

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fact that when a classification review of the staff assistant position was conducted, the position was classified at the I level, and not the II level.

Complainant argues that the staff assistant I position was created in September 1992 as a substitute "S" appointment. Complainant contends that the creation of this position by this means was contrary to Director's Procedure, P5-2-10, which permits such a position to be created when the incumbent is on leave of absence or for training purposes. Complainant maintains that neither circumstance existed here which would have justified creation of such a position.

Complainant finally argues that the abolishment of her position and redefining of the position to a higher pay grade was nothing more than a reallocation of an existing position. Complainant contends that the manner used to reallocate her position violated P 2-2-5. Complainant argues that the director's procedure requires that when an occupied position is allocated to a higher pay grade, when the incumbent meets the qualifications for the position, an examination should be held. Under this procedure, Complainant contends that when the incumbent does not meet the required qualifications, the incumbent should be laid off.

It is Complainant's position that she met the qualifications for the staff assistant position and should have been permitted to compete for the position. Complainant contends that any effort she might have exerted to compete for the position was thwarted by the fact that her position was abolished through an unlawful reorganization, she was told not to compete for the staff assistant position by Kanda and she was not made aware that the position in March 1993, was created on a permanent basis as a staff assistant I, not a staff assistant II.

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Complainant contends that Respondent's decision to lay her off due to a reorganization should be found to be arbitrary, capricious and contrary to rule or law. Complainant seeks relief in the form of an order directing Respondent to reinstate her with back pay and benefits to a position as a senior administrative clerk or a staff assistant I. It is Complainant's contention that her award of back pay should not be reduced because of an alleged failure to mitigate damages. Complainant maintains that she established at hearing that the position offered to her pursuant to Board Rule, R9-3-7, was not a comparable position and therefore she was under no obligation to accept the position.

Respondent maintains that the lay off was not arbitrary, capricious or contrary to rule or law. Respondent contends that the evidence presented at hearing supports the conclusion that Respondent adopted a plan of reorganization and implemented that plan. Respondent contends that the plan reflected a change to the fundamental structure, positions and/or functions accountable to executive director Salazar, the appointing authority.

Respondent further contends that to adopt a plan contingent on legislative action is not unusual. Respondent argues that to create a position by substitute "S" appointment to accomplish the plan of reorganization is not unusual. Nor is it out of the ordinary, Respondent maintains, to create a reorganization plan without reviewing the classifications contained in that plan, to determine if the duties assigned to the positions are consistent with the class specifications for those classification.

Respondent argues that if the lay off for purposes of reorganization is found to be arbitrary, capricious or contrary to rule or law, then the lay off should be deemed to have occurred for lack of funds and should be upheld on that basis. Respondent further asserts that if it is concluded that the lay off was in

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fact a reallocation, then it too should be deemed to be a sustainable action. Respondent argues that, if the action taken is found to be a reallocation, then it should be found that Complainant's position was reallocated to a higher grade, she did not possess the qualifications for the position and was therefore properly laid off.

The evidence presented at hearing established that there was no plan of reorganization posted in DNR on July 7, 1992. The July 7, 1992, memorandum was a proposal which concerned what DNR hoped to accomplish in the budget and planning area if the funding and FTE authorization was forthcoming from the legislature. Furthermore, the proposal, as it pertained to Complainant's position, described the abolishment of Complainant's position and creation of a staff assistant II position. However, the staff assistant II position was never created.

The evidence established that in the communications office the reorganization that occurred cannot be deemed to have changed the fundamental structure, positions and/or functions accountable to the appointing authority. Respondent's witnesses, Cattany and Horiuchi, offered some testimony that funding from one position in the department went to partially fund another position, and thus Complainant's lay off was necessary since the fundamental changes in the budget and planning area were financially connected to the changes in the communications office. Based on the totality of the evidence, this testimony appeared to be double talk. The testimony of Cattany and Horiuchi was not given any weight on this point.

The preponderance of the evidence established that there were no fundamental changes occurring in the communications office nor did such changes exist in relation to the appointing authority. Complainant acted as the support person to Kanda in the

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communications office. After her lay off, her position was "redefined" to create a position which did substantially the same work, supporting Kanda in the communications office.

If the reorganization is found to be arbitrary, capricious or contrary to rule or law, Respondent encourages the ALJ to sustain the decision to remove Complainant from her position on other basis. Respondent cites no authority, and the ALJ knows of no basis, upon which she could convert a lay off, which was accomplished in a manner which was contrary to rule, to a reallocation or to a lay off for reasons other than those stated by Respondent. The July 7, 1992, plan states that the reason for Complainant's lay off is a reorganization. Respondent cannot now come forward to argue that its action should be sustained on other grounds.

The evidence presented at hearing through Complainant's testimony established that she did not accept the position offered to her following her lay off because it was not comparable to the one she held. Complainant testified that it required substantially less computer work and required her to lift heavy files, which she did not have the ability to do. Complainant was under no obligation to mitigate her damages by accepting a position which was not comparable to the one from which she was laid off.

The parties move for an award of attorney's fees under section 24-50-125.5, C.R.S. (1988 Repl. Vol. 10B). Complainant is entitled to such an award because she established that Respondent's decision to lay her off was groundless. Despite Respondent's valiant attempts to create a scenario which would justify its action, the ALJ can find no support in the evidence for the decision to utilize the lay off rules to remove Complainant from her position.

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CONCLUSIONS OF LAW

1. Respondent's decision to lay off Complainant due to a reorganization was arbitrary, capricious and contrary to rule for the following reasons:

- a. The evidence established that there was no plan of reorganization only a proposal which set forth Respondent's future intentions with regard to organizational changes, contingent on funding and a classification review which supported the new position classifications.
- b. The purported plan which was reflected in the memorandum of July 7, 1992, was never implemented.
- c. The reorganization did not result in a change to the fundamental structure, positions and/or functions accountable to the appointing authority.

2. The position offered to Complainant following her lay off was not a comparable senior administrative clerk position and therefore Complainant had no obligation to mitigate her damages by accepting the position.

3. Complainant is entitled to full back pay and benefits from the date of her lay off to the date of reinstatement, less the appropriate offset.

4. The complainant is entitled to an award of attorney's fees under section 24-50-125.5, C.R.S. (1988 Repl. Vol. 10B) because the personnel action from which this appeal arose was groundless.

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ORDER

Respondent is ordered to be reinstated Complainant to the position of senior administrative clerk in the DNR communications office with back pay and benefits from the date of lay off to the date of reinstatement. Complainant is further entitled to award of reasonable attorney's fees and cost incurred in connection with pursuing the appeal of the groundless personnel action.

DATED this 4th day of
August, 1994, at
Denver, Colorado.

Margot W. Jones
Administrative Law Judge

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CERTIFICATE OF MAILING

This is to certify that on the ____ day of August 1994, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Barry D. Roseman
Attorney at Law
889 Logan Street, Suite 203
Denver, CO 80203

and to the respondent's representative in the interagency mail, addressed as follows:

Eric R. Decator
Assistant Attorney General
Department of Law
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